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IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, ET AL.,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court Of Appeals for the Third Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici comprise legal scholars at major American law schools who have studied, taught courses about, and/or published scholarship on federalism and other legal doctrines implicated in this case. Each of them has an interest in the faithful interpretation and application of the Tenth Amendment's anti-commandeering principle.

Amici are the following scholars:

Douglas A. Berman. Robert J. Watkins/Procter & Gamble Professor of Law, The Ohio State University College of Law.

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[1] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only. The parties have filed blanket letters of consent to the participation of *amici curiae*. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6.

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SUMMARY OF ARGUMENT

I. Congress may not, consistent with the anti-commandeering rule, prevent states from repealing state-law prohibitions on private conduct.

It is well understood that Congress lacks power to compel a state to "enact or administer" a prohibition on activity. *New York* v. *United States*, 505 U.S. 144, 177-79 (1992). By parity of reasoning, Congress likewise cannot prevent states from *repealing* state-law prohibitions on activity. Were it otherwise, Congress could force states to maintain laws that Congress could not have compelled the states to pass in the first place.

To the extent a state "authorizes" (*i.e.*, allows) private conduct to occur simply by repealing state laws forbidding it, such authorization equally cannot be preempted by Congress.

II. PASPA is unconstitutional because it prevents states from repealing state-law restrictions on sports gambling.

The court below wielded PASPA to strike down a 2014 New Jersey law repealing in part state-law restrictions on sports gambling. This flies in the face of the anti-commandeering doctrine. New Jersey's 2014 law simply repealed existing state laws. The

state has done nothing to facilitate or otherwise interfere in the conduct of sports gambling; it simply wishes to let the conduct alone at casinos and racetracks. Congress's admonition that New Jersey *must* proscribe all sports gambling, despite New Jersey's political and policy imperatives to the contrary, runs roughshod on our notion of federalism.

III. The effects of Congress's unprecedented intrusion on state sovereignty will have reverberations far outside the Garden State.

New Jersey is not unique in its decision to take a softer approach toward conduct that is barred under federal law. For example, virtually every state in the Union has repealed portions of its drug prohibitions to permit the possession of marijuana for medicinal or recreational use, even though federal drug laws continue to ban this conduct outright. The lower court's holding that state-law repeals are preemptible could render these experiments invalid and compel states to proscribe all manner of conduct, as a matter of *state* law, that the states would prefer to let alone.

ARGUMENT

I. CONGRESS LACKS THE POWER TO PREVENT STATES FROM REPEALING STATE-LAW PROHIBITIONS ON ACTIVITY

A. The Anti-Commandeering Rule Entitles States to Repeal State-Law Prohibitions on Private Activity

The anti-commandeering rule bars Congress from conscripting the regulatory apparatus of the states. Pursuant to the rule, Congress may not "issue directives requiring the States to address particular problems." *Printz* v. *United States*, 521 U.S. 898, 935

(1997); see *New York* v. *United States*, 505 U.S. 144, 177–79 (1992). Put another way, states may leave activity alone if they choose, even if that activity is prohibited under federal law.

It is axiomatic that, consistent with the anti-commandeering rule, Congress may not order a state to "enact or administer" a prohibition against some activity. *New York*, 505 U.S. at 188. But, as a logical corollary, Congress likewise may not preempt a state's *repeal* of a previously adopted prohibition the state no longer wished to keep. "[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring); see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1446 (2009) ("[W]hen state law simply permits private conduct to occur *** preemption of such a law would be tantamount to commandeering."). To avoid arbitrary results in the application of the anti-commandeering rule, states must be free to repeal prohibitions that Congress could not have compelled them to enact in the first place.

Properly understood, the Supremacy Clause empowers Congress to preempt only state action that *interferes* with activity—not state action that lets activity alone. That distinction is consistent with this Court's preemption jurisprudence. The Court has held state laws preempted when those laws have interfered with private conduct—*i.e.*, broadly speaking, made the conduct more (or less) costly. See Mikos,

On the Limits, at 1449 ("[T]he Court has found myriad state laws preempted, but only when the states have punished or subsidized (broadly defined) behavior Congress sought to foster or deter. . ."). [2] By contrast, "the Court has never held that Congress could block states from merely allowing some private behavior to occur, even if that behavior is forbidden by Congress." See *ibid.*

In short, a state is constitutionally entitled to repeal its own prohibitions on individual activity regardless how Congress might choose to regulate that activity under federal law. Congressional legislation that purports to block the repeal of state-law proscriptions constitutes impermissible commandeering.

B. The Anti-Commandeering Rule Likewise Entitles States To "Authorize" Activity By Repealing State-Law Prohibitions

Because Congress cannot prevent the repeal of a state-law prohibition, it likewise cannot prevent a state from "authorizing" activity when such authorization takes the form of a state-law repeal. When a state "authorizes" private activity merely by removing state-law impediments to it, the state is doing no more than *allowing* that activity to occur. Congress can no more forbid states to allow conduct than it

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[2] *E.g.*, *Arizona* v. *United States*, 567 U.S. 387 (2012) (state law barring undocumented immigrants from seeking work); *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000) (state tort suit claiming manufacturer had a duty to install airbags); *Ableman* v. *Booth*, 62 U.S. 506 (1858) (state court writ demanding release of prisoner being held under the federal Fugitive Slave Act).

could compel states to disallow that conduct in the first place.

Although "authorization" necessarily means allowing some activity to occur, the term is sometimes used more broadly to include state actions that go beyond mere grants of permission. If a state "authorizes" conduct by affirmatively *interfering* in that conduct, then its actions would be vulnerable to preemption. To clarify, imagine a state law that does two separate things: it repeals the state's prohibition on the possession of marijuana, and it also bars landlords from discriminating against tenants on the basis of their marijuana use. Both provisions might be understood to "authorize" marijuana possession in some sense, but only the latter provision could be preempted, because only the latter provision interferes with activity. By imposing a legal duty on landlords to accommodate marijuana use and removing the threat of eviction, the latter provision reduces the costs of marijuana use.[3]

One might argue that even a limited authorization-by-way-of-repeal "interferes" in private activity insomuch as it could increase the frequency of that activity. For example, the repeal of state-law prohi-

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[3] The court below had no need to discuss the relationship between "authorizing" and "licensing" sports gambling, but the two are closely related. Just like authorization, licensure merely provides the state's permission to engage in activity. If that is all licensing does, then it is not pre-emptible, for the same reasons authorization *qua* repeal is not pre-emptible. But if the license imposes *additional* restrictions that interfere with activity—such as requiring a retail licensee to collect sales taxes—those additional restrictions likely would be subject to preemption, even if the underlying license (permission) is not.

bitions on marijuana use could "incidentally change people's beliefs about marijuana use" by suggesting that marijuana is not harmful, in turn making it more likely that individuals will experiment with the drug. Mikos, *On the Limits*, at 1454.

Nonetheless, Congress cannot preempt state authorization qua repeal on the basis of such expressive effects alone:

> Allowing Congress to preempt state laws merely on the basis of their perceived expressive content and related impact on behavior would eviscerate the anti-commandeering limits on Congress's preemption authority: every state law conceivably has some expressive content and some impact on behavior. It also raises nettlesome First Amendment concerns. **** [T]o the extent that state laws perform a purely expressive function, they arguably constitute protected speech and hence may not be preemptable.

Id. at 1455; see also Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 Brooklyn L. Rev. 1295-1301 (2004).

In sum, Congress may not, consistent with anti-commandeering principles (and potentially the First Amendment), prevent states from merely allowing—"authorizing"—private conduct to occur for purposes of state law. State-law repeals of state-law prohibitions are, quite simply, not matters that require Congress's approval.

II. PASPA IS AN UNCONSTITUTIONAL ATTEMPT TO PREVENT STATES FROM REPEALING STATE-LAW PROHIBITIONS ON SPORTS GAMBLING

Under the foregoing principles, the Professional and Amateur Sports Protection Act ("PASPA") is unconstitutional. PASPA makes it unlawful, *inter alia*, for states to "sponsor, operate, advertise, promote, license, or *authorize* by law" sports gambling. 28 U.S.C. § 3702(1) (emphasis added).[4] This provision, as interpreted by the court below, prevents states from simply repealing state-law prohibitions on sports gambling. This is a clear violation of the anti-commandeering rule.

a. New Jersey long ago enacted various statutes that prohibit sports gambling for purposes of state law. Among other things, those statutes make bookmaking a state crime, punishable by hefty fines (up to $35,000) and lengthy prison terms. N.J. Stat. Ann. § 2C:37-2(b). The statutes also make wagers on sporting events unenforceable. *Id.* at § 2A:40-1.

In 2014, however, the New Jersey state legislature sought to repeal those prohibitions, at least as applied to sports gambling activities at casinos and

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[4] For ease of exposition, this brief uses the term "sports gambling" to refer to all of the gambling activities regulated by PASPA. See 28 U.S.C. § 3702(2) (prohibiting a "lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games").

racetracks. 2014 N.J. Session Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9 ("2014 Law"). In relevant part, the 2014 Law declares that the prohibitions cited above, among others,

> are repealed to the extent they apply *** at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

Id. at § 5:12A-7(1).

The court below held that the 2014 Law "authorized" sports gambling, in violation of PASPA, by "selectively grant[ing] permission to certain entities to engage in sports gambling." *Nat'l Collegiate Athletic Ass'n* v. *Governor of N.J* ("*Christie II*")., 832 F.3d 389, 397 (3d Cir. 2016) (*en banc*); see also *id.* at 401 ("[A] state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA."). It therefore affirmed a permanent injunction barring state officials from giving effect to the 2014 Law.

b. So construed, PASPA is unconstitutional. The 2014 Law merely repealed certain of New Jersey's prohibitions on sports gambling—nothing more. Whether the law did so "selectively" or not is irrelevant for purposes of assessing Congress's power to preempt it. The sundry other terms the court used to describe the effects of the 2014 Law—"specific permission," "empowerment," and "permissive[] channel[ing]" of sports gambling, *Christie II*, 832 F.3d at 396, 401—simply restate the conclusion that New Jersey has chosen to allow certain conduct to occur as a matter of state law. The 2014 Law does nothing to "interfere" in sports gambling in the manner discussed above—*i.e.*, in a constitutionally relevant sense. Because PASPA purports to block New Jersey's bare repeal of a state-law prohibition, it flouts the anti-commandeering rule. Indeed, New Jersey has quite literally been commandeered in this case: the lower court's ruling commands that New Jersey re-instate its prohibition on sports gambling in casinos and racetracks.

To illustrate the functional equivalence of the many ways a state can effectively repeal a prohibition on activity, consider the following hypothetical. Suppose that long ago a state adopted the Minimum Drinking Age Act (MDAA), which declares that "It is unlawful for anyone under the age of 21 to possess alcohol." Now suppose that the state has recently had a change of heart and wants to lower its minimum drinking age to 18. It could accomplish this end in any number of ways, including by adopting one of the following laws:

> (A) "MDAA is hereby repealed as applied to anyone 18 years of age or older."

> (B) "Anyone 18 years of age or older is hereby authorized to possess alcohol."
>
> (C) "Prohibiting possession of alcohol by college age students is costly, ineffective, and counter-productive. The language of MDAA is therefore amended to substitute '18' for '21'."

Each of these laws accomplishes the same permissible end: each provides that the state will not punish anyone 18 years of age or older for possession of alcohol. The linguistic differences among them do nothing to alter the constitutional question whether Congress may preempt what is, at bottom, a state-law repeal of a state-law prohibition. In each case, the answer is "no." After all, Congress could not have instructed the state to pass the original MDAA with its 21-year-old age cutoff in the first instance. It makes little sense to suggest that Congress can later entrench that cutoff by blocking its repeal, partial or otherwise.

What is more, like the statutes invalidated in *Printz* and *New York*, PASPA threatens to diminish accountability in our federal system. As noted above, PASPA has reinstated New Jersey's prohibition on sports gambling after the state's attempt to repeal those prohibitions. Under state laws that were enacted decades ago, casinos, racetracks, and their patrons once again face stiff sanctions for engaging in sports gambling.

Should resuscitation of the state's prohibitions prove unpopular, as seems likely, voters will face difficulty sorting out who is to blame: The state legislature for failing successfully to repeal the state's pro-

hibitions on sports gambling? The Casino Control Commission, Racing Commission, county prosecutors, or state judges for continuing to enforce those prohibitions? Congress for creating this mess? By blurring the lines of accountability the anti-commandeering rule was designed to sharpen, PASPA threatens to make New Jersey officials "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York* v. *United States*, 505 U.S. 144, 169 (1992).

c. The cases cited by the court below do not provide any alternative basis on which to affirm its holding. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *F.E.R.C.* v. *Mississippi*, 456 U.S. 742 (1982) both involved federal statutes that merely encouraged states to assist with a federal regulatory program. See *Printz*, 521 U.S. at 926 (explaining that the statutes at issue in *Hodel* and *F.E.R.C.* merely made compliance with federal demands a "precondition to continued state regulation in an otherwise pre-empted field"). By contrast, PASPA offers no carrot, just a command to maintain existing state prohibitions on sports gambling.

South Carolina v. *Baker*, 485 U.S. 505 (1988) and *Reno* v. *Condon*, 528 U.S. 141 (2000) are likewise inapposite. Both upheld federal statutes that subjected the states' participation in the market (as bond issuers and database sellers) to the same regulations as their private counterparts. PASPA's "authorization" ban, by contrast, is designed precisely to constrain states as sovereign bodies. Compare 28 U.S.C.

§ 3702(1) (making it unlawful for states to "to sponsor, operate, advertise, promote, license, or authorize by law" sports gambling schemes) with *id.* at § 3702(2) (making it unlawful for a person to "sponsor, operate, advertise, or promote"—but *not* authorize or license—sports gambling). In other words, PASPA's prohibition against authorizing (or licensing) sports gambling is not generally applicable.

* * *

In sum, Congress has chosen an impermissible means to address its sports gambling problem. It has conscripted the aid of the states by preventing them from repealing their own prohibitions on sports gambling. The anti-commandeering rule does not permit this: to ensure the healthy functioning of our federal system, it requires Congress to assume the fiscal and political costs of its own regulatory programs. See, *e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill. L. Rev. 1349, 1360-61 (2001) (arguing that the anti-commandeering doctrine forces Congress to internalize the financial and political costs of its programs).

III. ENABLING CONGRESS TO OSSIFY STATE-LAW PROHIBITIONS WOULD UNDERMINE FEDERALISM BEYOND THE REALM OF SPORTS GAMBLING

This case has implications that extend far beyond sports gambling. The states have selectively repealed portions of prohibitions directed at a wide range of activities, often in the shadow of federal prohibitions that remain entrenched. The muddied reasoning of *Christie II* threatens to frustrate those efforts and erode the very notion of states as laboratories for democracy.

Consider, first, state marijuana law reforms. Over the past two decades, nearly every state in the nation has repealed a portion of its prohibition on the possession of marijuana.[5] *E.g.*, National Conference of State Legislatures, State Medical Marijuana Laws, Aug. 30, 2017, available at http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Many have done so by adopting laws that bear a striking resemblance to the 2014 Law at issue here. For example, Colorado's Amendment 64 does not just repeal that state's prohibition on the possession of marijuana writ large; it selectively dictates who may possess marijuana (*e.g.*, adults but not minors), how much they may possess (one ounce or less), and where they may possess it (*e.g.*, at home but not in public), among other matters. See generally Colo. Const. art. XVIII, § 16. Many states have even repealed their marijuana laws using the magic word "authorization." *E.g.*, 22 Me. Rev. Stat. Ann. § 2423-A ("*Authorized* conduct for the medical use of marijuana. *** (1) **** a qualifying patient *may* [inter alia] *** [p]ossess up to 2 ½ ounces of prepared marijuana") (emphases added).

These acts of authorization-qua-repeal have been adopted in the shadow of a federal ban that criminal-

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[5] States have also adopted sundry regulations to replace those prohibitions. For example, Colorado's Retail Marijuana Code imposes a variety of product testing, packaging, and labeling requirements on state licensed marijuana suppliers. See Colo. Code Reg. 212-2.1501 & 1503 (2017). To the extent such requirements interfere with activity—*i.e.*, to the extent they go beyond repealing prohibitions—they are vulnerable to congressional preemption. Whether they are in fact preempted depends, of course, on congressional intent.

izes virtually all possession, manufacture, and distribution of marijuana for purposes of federal law. 21 U.S.C. §§ 841, 844; see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (concluding that terms of the statute "leave no doubt that the [medical necessity] defense is unavailable" under the Controlled Substances Act, given Congress's determination that "marijuana has no medical benefits worthy of an exception").

Not surprisingly, the specter of preemption already looms large over this field. Numerous preemption challenges have been levied against state reforms. *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. Health Care L. & Pol'y 5, 6-7, 14-15 (2013) (citing examples). The holding of *Christie II* only adds fuel to the fire. *Christie II* suggests that the repeal of a state's marijuana prohibition is vulnerable to preemption, and that Congress could force some or all of the states to reinstate the broad prohibitions they had previously adopted (in some cases, decades earlier). Indeed, some litigants have already suggested that such state-law repeals are preempted by federal drug laws in part because they "authorize" the possession, manufacture, and distribution of marijuana. See Petition for Writ of *Certiorari*, *State of Nebraska and Oklahoma* v. *State of Colorado*, 2014 WL 7474136 (U.S. Dec. 18, 2014) (No. 144, Original) (claiming that Colorado's Amendment 64 is preempted, in part, because it "affirmatively *authorizes* conduct prohibited by federal law") (emphasis added).

Similarly, many states have created exceptions to broad state-law prohibitions on the possession of firearms in schools and in other circumstances. For

example, Georgia provides that its firearms ban does not apply to a "person who has been *authorized* in writing" by a school official to possess firearms on school grounds. Ga. Code Ann. § 16-11-127.1(c)(6) (emphasis added). Likewise, Michigan's ban does not apply to possession that is "with the *permission*" of a school official. Mich. Comp. Laws Ann. § 750.237a(5)(e) (emphasis added).

Once again, these state laws have been enacted against a backdrop of extensive federal regulation. The Gun Control Act of 1968 (GCA), 18 U.S.C. § 922, prohibits possession of firearms in a host of circumstances, including possession in a school zone, *id.* at § 922(q)(2)(A).

In light of the discrepancies between state and federal firearm laws, the reasoning of *Christie II* poses a threat to state laws that grant selective permission to possess firearms in circumstances not tolerated by federal law. Even if Congress presently defers to some state exceptions,[6] *Christie II* instructs that it is not bound to do so.

These and other examples demonstrate that the constitutional ramifications in this case will not be confined to the casinos and racetracks of New Jersey. Rather, the lower court's holding that state-law repeals are pre-emptible could potentially compel states to proscribe a host of activities that they have mindfully chosen *not* to penalize under state law.

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[6] It does so by expressly incorporating some of those exceptions into the provisions of the Gun Control Act. See, *e.g.*, 18 U.S.C. § 922(q)(2) (exempting from federal ban on firearms possession in school zone possession that has been "licensed *** by the State").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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